No. 14,394

United States Court of Appeals

For the Ninth Circuit

WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

BRIEF OF APPELLEES NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK FOOTBALL GIANTS CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB.

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PRELIMINARY STATEMENT.

The action was commenced by William Radovich in the District Court of the United States for the Northern District of California, Southern Division, claiming treble damages under the provisions of the Sherman Act. Motion to dismiss the complaint was made upon the grounds:

(1) That the complaint indicates a lack of jurisdiction in the Court over the subject matter.

(2) That the complaint fails to state a claim upon which relief can be granted.

The Honorable George B. Harris made an order granting the motion to dismiss.

SUMMARY OF ARGUMENT OF APPELLEES.

The order of the Honorable District Court was a proper one for each of the following assigned reasons:

(1) The complaint fails to allege the basic and elemental facts which the decisions hold to be requisite to the statement of a cause of action under the provisions of the Sherman Act, i.e.

(a) An unreasonable restraint or monopoly, of

(b) interstate or international activities

(c) which constitute trade or commerce within the meaning of the act

(d) a substantial detriment to the public

(e) special damage to the plaintiff in his business or property caused by the restraint upon interstate commerce.

(2) The complaint alleges facts indistinguishable from those presented in *Toolson v. New York Yankees,* 346 U.S. 356.

(3) The complaint does not allege that the appellees are engaged in any endeavor which can be

construed as "trade or commerce" within the intent of the antitrust laws.

(4) The allegations of the complaint relative to the interstate aspects of the exhibitions of professional football indicate such to be merely incidental to the principal activities of appellees.

(5) The complaint does not allege any substantial detriment or even any detriment suffered by the public from any of the alleged action of appellees and consequently the complaint fails to qualify as a proper claim for treble damages since the right of private action afforded by the Sherman Act was granted to encourage private citizens to assist in the elimination of practices which caused public harm.

(6) The complaint does not allege that the damage suffered by plaintiff was caused by the acts of appellees which are alleged as violations of the antitrust laws.

(7) The decisions of the United States Supreme Court in *Federal Baseball Club v. National League,* 259 U.S. 200 and *Toolson v. New York Yankees,* 346 U.S. 356 are predicated upon a pattern of operation involving the formation of leagues and the control of player talent through the instrumentalities of a uniform players contract and a reserve clause, and the doctrine of stare decisis requires the application of such decisions to the sport of football which the complaint alleges to be organized and operated upon identical lines.

The contentions of Appellees will be herein advanced as part of their reply to the arguments found in appellant's brief.

REPLY ARGUMENT.

The argument of appellant in his opening brief is divided into two main parts, the first relating to the general bases for jurisdiction in actions of this nature and the second considering the extent to which the doctrine of stare decisis would make applicable the decisions of the United States Supreme Court in *Toolson v. New York Yankees,* 346 U.S. 356 and *Federal Baseball Club v. National League,* 259 U.S. 200. The first part is subdivided in its consideration of various facets of the jurisdictional problem but advances substantially the same claims of jurisdiction which are presented in the various baseball cases. The second part proscribes the doctrine of stare decisis and would reduce its effect to that of the doctrine of res adjudicata.

The subdivisions of appellant's brief are not restricted to the treatment of particular phases of the subject and consequently a topical consideration of the argument is not permitted. For the convenience of the Court in correlating the reply with the argument, the brief of appellees will follow the numbering and lettering adopted by appellant.

Part I A 1

Appellant herein reminds the Court of the common law background of the legislation relating to restraints of trade. We do not interpret this portion of the brief as a claim for redress under rights existing at common law. Lest we misinterpret the argument however, may it be indicated that the complaint before us is one based solely upon a statutory right and remedy and that a Federal forum has been sought upon the allegation that the Sherman Act constitutes the basis for the action.

We too are not unmindful of the influence of the common law upon the development of this field of law. But at any attempt to ascribe only common law parentage to the body of anti-trust law we can only observe that it would take an extremely wise child to recognize such ancestry. Despite its promptings the law relating to restraints of trade has developed with limitations and extensions, refinements and distensions which take it beyond common law concepts to the degree that it is practically sui generis.

In *Shotkin v. General Electric Co.* 171 F. (2d) 236 (10th Circuit 1948) the court though recognizing the influence of the common law, promptly points out the tangent pursued by the Sherman Act to the extreme that only matters which affect public interest are of concern. At page 238 of such decision is stated:

> "The general principles of the common law relating to contracts for the restriction or suppression of competition in the markets, agreements to fix prices, concerts to divide marketing

territories, understandings to apportion customers, meeting of minds to restrict production, unity of purpose to furnish inferior products, and other like practices which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the markets are familiar to all and therefore do not call for elaboration here. But the resulting restraints of trade were not penalized and they did not give rise to any actionable wrong. The Sherman Act, approved July 2, 1890, 26 Stat. 209, 15 U.S.C.A. §§1-7, 15 note, took its origin from that common-law background, and its primary purposes were more effective protection of the public from the evils of restraints on the competitive system. It extended the inhibition to any combination or conspiracy, whatever its form, having injurious effects of that kind upon the competitive system, and it provided both public and private remedies for the injuries flowing from the restraints. United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L. Ed. 136; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L. Ed. 619, 34 L.R.A., N.S., 834, Ann. Cas. 1912D, 734; Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044.

Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstruct-

ing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; Ramsay Co. v. Associated Bill Posters of United States and Canada, 260 U.S. 501, 43 S. Ct. 167, 67 L. Ed. 368; United States v. American Linseed Oil Co., 262 U. S. 371, 43 S. Ct. 607, 67 L. Ed. 1035; Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145

It is essential to recovery in an action of this kind that plaintiff allege and prove two things, a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert. Wilder Manufacturing Co. v. Corn Products Refining Co., supra; Glenn Coal Co. v. Dickinson Fuel Co., 4 Cir., 72 F. 2d 885. The injury to the public need not be nationwide in geographical scope. If it involves monopolistic effect upon interstate commerce, it is enough even though it be narrow in geographical extent. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996; William Goldman Theatres, Inc. v. Loew's, Inc., 3 Cir., 150 F.2d 738, Id., 3 Cir., 164 F.2d 1021,

> certiorari denied, 334 U.S. 811, 68 S.Ct. 1016. But it must injuriously affect public interest, and the effect must be appreciable."

The complaint of appellant here before us is a thin voice when tested by the standards of the *Shotkin* case.

By quotation from *Atlantic Cleaners and Dyers v. United States,* 286 U.S. 427, appellant apparently attempts to establish that the word "trade" is comprehensive enough to include the playing of football. The case is not a very convincing support of such position. It involved injunctive proceedings instituted by the United States against price fixing activities of a group of firms carrying on the business of cleaning, dyeing and renovating wearing apparel at plants located in the District of Columbia. Defendants contended that they were not engaged in "trade or commerce" in that such expressions were equivalent to traffic in goods, or buying and selling in commerce or exchange. Justice Sutherland pointed out that trades are sometimes carried on without buying or selling goods, an obvious answer to a specious defense.

The *American Medical Association* case cited in appellant's brief (130 F. (2d) 233) held that a Group Health Association functioning in the District of Columbia was engaged in trade or commerce. The Court observed:

> "The common law recognizes the practice of medicine as a trade . . . Congress chose to take

over in the Sherman Act the common law concept of trade . . . "

The most that these decisions tell us is that prior to the passage of the Sherman Act certain fields of endeavor had been classified as trades by the common law and that Congress at the time of the adoption of the Act was aware of such decisions and intended the words "trade or commerce" to be descriptive of those fields of endeavor. Conceding the fiction we can readily reply that the playing of football was unknown to the common law as a trade or otherwise. We can also rely upon the fact that the United States Supreme Court has held that the playing of baseball, an indistinguishable endeavor, was not intended by Congress to be embraced by the term "trade or commerce" as such term is employed in the Sherman Act. (*Federal Baseball Club v. National League,* 250 U.S. 200; *Toolson v. New York Yankees, Inc.,* 346 U.S. 356.)

Section I A 2 of appellant's brief offers several thoughts relating to the scope of the Sherman Act. Decisions are cited in support of the statement that Congress intended to exercise its full power under the commerce clause when it enacted the Sherman Act. The implication must be that the interstate commerce clause of the Constitution is comprehensive enough to include the playing of football and the Sherman Act is co-extensive with such clause. The

position is unsound. While it is true that the Supreme Court has said in several cases that Congress exercised its full constitutional power in the enactment of the Sherman Act, the decisions are clear that the full exercise of that power was limited to preventing restraints on commercial competition in interstate trade or commerce.

> *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 495; *United States v. Frankfort Distilleries,* 324 U.S. 293, 297-8.

In *Apex Hosiery Co. v. Leader* the Court held that although Congress had the power to bring the questioned conduct under the Sherman Act, it had not done so, the Court pointing out that the acts of the defendants did not involve any commercial competition which had always been held an essential element of a violation of the Sherman Act, and that it was only in the sense of preventing restraints on commercial competition that Congress exercised its full constitutional authority. The Court stated in part:

> "Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction not constitutional power."
>
> " * * * The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

> "* * * Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.' Atlantic Cleaners and Dyers v. United States, supra, (286 U.S. 435.)"

Plainly the question of whether the alleged activities of appellees are within the orbit of the Sherman Act is also a matter of statutory construction and not of constitutional power. It may be assumed that Congress has the power to regulate a business utilizing interstate commerce and transportation even though it does not involve restraints upon commercial competition. The error of appellant is in assuming that because it has such power it exercised it in the Sherman Act with respect to the activities alleged in this complaint.

Appellant further argues that the playing of football is interstate commerce, that as a consequence Mr. Radovich is engaged in an interstate occupation and hence any activities of appellees which harmed Mr. Radovich in the matter of his employment would constitute a violation of the Sherman Act. The process of logic which arrives at such a non sequitur would bear tracing. In its first unwarranted step it assumes that the playing of football is commerce as the term is employed by the Act. Furthermore it evidences an inability to distinguish between the em-

ployment of Mr. Radovich and interstate commerce. The case for Mr. Radovich would be no more persuasive had he been employed in a field, the interstate character of which was unquestionable, and had the nature of his employment been such as to take it beyond the labor exemption of the anti-trust acts. If under such assumed circumstances an industry wide conspiracy had blacklisted Mr. Radovich from further employment he could find no redress under the Sherman Act unless he could show some substantial impact of the conspiracy upon interstate commerce, not merely upon the financial position of Mr. Radovich.

The facts as here assumed for sake of example are present in *Hunt v. Crumboch,* 143 F. 2d 902. The plaintiff, a trucker engaged in interstate hauling was driven out of business by concerted labor union activity designed to such end. In affirming the dismissal of the complaint the Court stated in part:

> "Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public.
>
> " . . . We must assume, for nothing to the contrary appears in the plaintiff's case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work

> formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of the defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public however, it is immaterial whether the plaintiffs or others provide the services."

Even the *Mandeville Farms* case which seems to afford appellant such comfort points out the dual consequences which must flow from conduct to render it subject to the treble damage liability of the Sherman Act:

> "It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public *and* the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner's controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself."

The primary requisite of an injury to the public prior to any consideration of private injury is well established by the decisions. The private statutory right of action to recover treble damages caused by a violation of the Sherman Act was created to induce private persons to assist in the enforcement of the

Act. However, the private right of action is incidental and subordinate to the protection of the public. *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 360; *Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469, 500; *Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, 239; *Feddersen Motors v. Ward* (10th Cir., 1950), 180 F. 2d 510, 521-522; *Glenn Coal Co. v. Dickinson Fuel Co.* (4th Cir., 1934), 72 F. 2d 885, 889; *Abouaf v. J. D. & A. B. Spreckels Co.* (N.D. Cal., 1939), 26 F. Supp. 830, 832-833; *Myers v. Shell Oil Co.* (S.D. Cal. 1951), 96 F. Supp. 670, 674; *Citizens Publishing Co. v. Merchants & Mfr. Ass'n.* (D.D.C., 1949) 83 F. Supp. 994, 997.

The principle is well stated in *Shotkin v. General Electric Co.* (171 F. 2d 236, 239):

> " * * * Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. *There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination, or concert* * * * "

In *Apex Hosiery Company v. Leader,* 310 U.S. 469, 500, the Supreme Court stated:

> " * * * Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs* which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition . . . "

The complaint of appellant before us contains no allegations even remotely suggesting a public wrong or any impact upon commercial competition. There is no contention that the quality of football has been lessened or the prices of admissions increased by the refusal to employ appellant as a coach for a minor league team. No allegation is found as to a lessening of competition; on the contrary it appearing obvious that the player regulations complained of have as their purpose the preservation of balanced teams to insure competition. There is no claim that the team deprived of the services of Radovich found him irreplaceable. The complaint tells us merely that appellant was unable to obtain employment in a particular branch of endeavor.

To such complaint should be addressed the words of this Honorable Court in *Conference of Studio Unions v. Loews, Inc.* 193 F. 2d 51:

> "* * * A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the Anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed *which harms him.* He must show that he is *within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.* Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.

> Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and *withheld from those who seek the windfall of treble damages because of incidental harm.*"

By the citation of *United States v. National Football League*, 116 F.S. 319, appellant makes the obvious point that a person not himself engaged in interstate commerce may commit acts which affect interstate commerce. The Court in such proceeding was concerned only with the agreement among the member teams of the National Football League restricting broadcasting and telecasting. There could be no question but that radio and television were interstate commerce. The Court believed that the restrictive agreement imposed substantial restraints on the television and radio industry and assumed jurisdiction upon the ground that since the league agreement restricted substantially something which is in interstate commerce it is immaterial whether professional football by itself is commerce or interstate commerce.

Appellees do not contend that none of the activities of professional football is subject to federal regulation or that professional football or these appellees could not engage in activities which would constitute a violation of the Sherman Act. What we do contend is that none of the activities, by which appellant was allegedly damaged and which alone are before this

Court for consideration, either violates or comes within the scope of the Sherman Act.

In the consideration of the National Football League case there is found the word "substantial" as a qualifier to the expression "restriction upon interstate commerce." The same combination of words runs through all of the anti-trust decisions as a *leit motif,* imposing an essential condition upon the invocation of the treble damage provisions of the Sherman Act upon any course of conduct. To warrant the sanctions of the Act the complaint must allege not a mere impingement upon interstate commerce but that such conduct substantially affects interstate commerce. It is well established that in order to furnish a basis for an action under the Sherman Act, any restraint of interstate trade or commerce must be a substantial restraint. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U. S. 219, 234; *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U.S. 344, 410-411, 412; *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.* (1924), 265 U.S. 457; *Levering & Garrigues Co. v. Morrin* (1933), 289 U.S. 103; *Chicago Board of Trade v. United States* (1918), 246 U.S. 231, 238; *Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469.

Although the complaint here alleges that the normal activities of appellees touch upon various facets of interstate commerce such as transportation, radio and television, it is not alleged, nor can it be alleged that the non-employment of appellant would have

any substantial or indeed any effect upon such instruments of interstate commerce.

I B 1. This subsection of appellant's brief "overrules" and then distinguishes the *Federal Baseball* case. It might have been read with concern prior to the *Toolson* case. It can now be considered only by ignoring the Toolson decision.

The *Mandeville Island Farm* case is advanced as contradictory of the opinion of the Supreme Court that the playing of baseball could be considered an intrastate act. Appellant reads the Federal Baseball Decision to a result that manufacturing and production are separable from their interstate effect. He finds in Mandeville Island Farms an opposite result. We find nothing inconsistent between the cases. The *Mandeville* case does not hold that the production of sugar beets, the sugar beets themselves, the local sale of sugar beets or even the refining of sugar from the sugar beets constituted interstate commerce but instead that the restraints imposed upon these local activities were intended to restrain, and did restrain, interstate commerce in sugar. In such case the end and objective of the defendants was the distribution and sale of sugar in interstate commerce. The defendants sought to avoid liability for their attempt to monopolize and control that commerce by a claim that their illegal agreements dealt only with the price paid for beets before their manufacture into

sugar. In the baseball cases and in the case at bar the end and object was the playing of a local game. Certainly interstate communication and travel are incidental to the playing of the games. But it is not contended that any actions by organized baseball or football in restraint of such interstate features caused any injury to complainants. The player regulations by which appellant alleges he was damaged were designed to affect and did affect only the playing of the local games. Appellant would concentrate attention upon these incidental activities which are in no manner affected by the player regulations and by which appellant was in no way damaged and would disregard the main and sole objective of appellees—a local activity to which alone the player regulations are designed to apply and do apply. The regulations were not designed to affect and did not have the slightest effect upon any of the incidental interstate activities of appellees or upon interstate communication or travel.

Appellant contends that the factual setting which existed at the time of the Federal Baseball decision has been changed by the commercial bargaining for interstate television and broadcasting profits. Today's factual setting, however, presents no change from that which existed in 1953 when the same arguments were rejected by the Supreme Court when advanced on behalf of George Toolson.

The citation of *United States v. Employing Plasterer's Ass'n* to indicate the difficulty in delineating in-

terstate and local commerce, neither disposes of the *Federal Baseball* case nor adds to this discussion.

The case, heard in conjunction with that of the Lathers Association (both reported at 347 U.S. 452) considered the effect of the activities of various unions in the Chicago area upon the interstate flow of building materials. The only point pertinent to the matter here on appeal is found in the dissenting opinion of Justice Minton, in which Justice Douglas concurs. Both the *Toolson* and the *Federal Baseball* cases are cited in support of the position that bringing laborers across state lines to work in Chicago does not constitute interstate commerce. The opinion indicates that the Supreme Court as recently as 1954 regarded the *Federal Baseball* case and the *Toolson* case as vital expressions of law.

I B 2. In the nature of an offer of proof appellant enumerates putative facts which he might have introduced within the framework of the complaint which was dismissed. His legal conclusion is that the matter was resolved to a question of fact and that the motion to dismiss was not properly entertained. The authority for the conclusion is a quotation from the Supreme Court in *U.S. v. Employing Plasterers' Assn.* (properly cited at 347 U.S. 452) as follows:

> "And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

We have no quarrel with the quoted principle of law. We do insist however that a complaint to be sufficient must *"charge every element necessary to recover"* as such principle exacts.

In order to make a proper statement of claim for recovery of treble damages under 15 USC 15 for alleged violations of § 1 and § 2 of the Sherman Act, a complaint must allege facts which, if proved, would establish[1] an unreasonable restraint of, or a monopoly of, or an attempt to monopolize[2] interstate or international activities which[3] constitute trade or commerce within the meaning of the Act,[4] a sub-

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[1]*Standard Oil Co. v. United States,* 221 U.S. 1; *United States v. American Tobacco Co.,* 221 U.S. 106, 180; *Board of Trade v. United States,* 246 U.S. 231, 238; *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 376-7; *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 486-501; *Sugar Institute, Inc. v. United States,* 297 U.S. 553, 597; *United States v. Columbia Steel Co.,* 334 U.S. 495, 521-2.

[2-3]*Apex Hosiery Co. v. Leader,* 310 U.S. 469; *Federal Baseball Club v. National League,* 259 U.S. 200, 208-9; *United States v. Yellow Cab Co.,* 332 U.S. 218, 230-3; *Levering Co. v. Morrin,* 289 U.S. 103, 107; *National League v. Federal Baseball Club* (CCA, D. of C.), 269 Fed. 681, 684-5; *F & K Co. v. Special Site Sign Co.* (CCA 9), 85 F. (2d) 742, 750, cert. den. 299 U.S. 613; *McJunkin v. Richfield Oil Co.* (D.C. Cal.), 33 F. Supp. 466, 469.

[4]*Shotkin v. General Electric Co.* (C.C.A. 10), 171 F. (2d) 236, 238-9; *Feddersen Motors v. Ward* (C.C.A. 10), 180 F. (2d) 519, 521-2; *Citizens Pub. Co. v. Merchants & Manufacturers Assn.* (D.C.D. of C.), 83 Fed. Supp. 994, 997; *Riedley v. Hudson Motor Car Co.* (D.C. Ky.), 82 Fed. Supp. 8, 10; *Glenn Coal Co. v. Dickinson Fuel Co.* (C.C.A. 4), 72 F. (2d) 885; *Myers v. Shell Oil Co.,* (D.C. Cal.), 96 F. Supp. 670, 674; *Arthur v. Kraft-Phenix Cheese Corp.* (D.C. Md.), 26 F. Supp. 824; *Abouaf v. Spreckels Co.,* 26 F. Supp. 830, 832-3.

stantial detriment to the public and[5] special damage to the plaintiff in his business or property proximately caused by the alleged restraint upon monopoly of or attempt to monopolize interstate commerce.

It is obvious from a consideration of the standards prescribed by the decisions for a proper statement of a cause of action in proceedings of this nature that the complaint of appellant fails to state a claim upon which relief can be granted and indicates a lack of jurisdiction in the Court over the subject matter. In testing the sufficiency of the complaint by the standards so established it is not incumbent upon us to consider the putative facts that appellant has "shouted into the record" by the offer of proof found in his brief. While we are certain that the Court does not expect such free assertions to be even freely denied we cannot resist the aside that many of the assertions appearing in this section of the brief are founded in fantasy. Nothing could be farther from fact than the claim that admission prices to games are fixed by agreement of interstate franchise holders. There is no parity whatever in admission prices throughout the league. The statement that admission prices have been established beyond the reach of the small wage earner is preposterous. Prices of admission to pro-

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[5]*Glenn Coal Co. v. Dickinson Fuel Co.* (C.C.A. 4), 72 F. (2d) 885, 887; *Gerli v. Silk Ass'n* (S.D. N.Y.), 36 F. (2d) 959, 960; *Westmoreland Asbestos Co. v. Johns-Manville Co.* (S.D.N.Y.), 30 F. Supp. 389, 391, aff'd 113 F. (2d) 114; *Beegle v. Thomson* (C.C.A. 7), 138 F. (2d) 875, 881, cert. den. 322 U.S. 742; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 153; *Revere Camera Co. v. Eastman Kodak Co.* (D.C. Ill.), 81 F. Supp. 325, 331; *Westor Theatres v. Warner Bros. Pictures* (D.C.N.J.), 41 F. Supp. 757, 763; *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8.

fessional football games are far below those for collegiate competition.

The complaint which appellant would justify invites the inquiry of the Court into a field which the Supreme Court holds not to be commerce and whose activities have been decreed to be local and not interstate. It alleges no detriment whatever to the public, much less the substantial detriment essential to jurisdiction. It indicates no causal connection between the alleged restraint upon interstate commerce and the alleged injury sustained by appellant.

We can concede that the question of the reasonableness of any restraint is one of fact in the ultimate analysis. But the reasonableness of the restraint is only one of the five elements which must appear from the complaint to render it sufficient. The bases of jurisdiction must be present before such issue of fact can be tried. The process of the Court of Appeals for the 10th Circuit in analyzing the complaint in *Feddersen Motors Inc. v. Ward,* 180 F. 2d, 519, 522 would seem most apposite:

> "With these general principles in mind, we come to the crucial question whether the complaint stated a cause of action cognizable under the Act. The pleading did not allege facts constituting the constituent elements of the familiar pattern of combination or conspiracy among competitors in the field of industry or commerce to fix prices, divide marketing territories, apportion customers, restrict production, or otherwise suppress competition. It alleged that the defendants formed a combination or conspiracy in restraint

of interstate commerce. It further alleged that they combined and conspired to force plaintiff out of business as a dealer in Hudson automobiles. It further alleged that defendants had discriminated against plaintiff in certain respects. And it further alleged that the effect of the unlawful acts and practices on the part of defendants was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public. No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from Detroit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which

it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest. Failing to contain allegations of that requisite nature, the pleading was insufficient in law to state a cause of action for which relief could be granted under the Act. Shotkin v. General Electric Co., supra."

Dissection of appellant's complaint, in the foregoing manner would prove fatal even in the absence of the *Federal Baseball* and *Toolson* decisions.

I C 1. Appellant again submits the argument that one need not himself be engaged in interstate commerce to subject himself to the sanctions of the Sherman Act if he be guilty of conduct which does restrain interstate commerce. Appellees again concede that such is the law with the qualification that the effect upon interstate commerce must be substantial.

However, the gap which appellant fails to perceive or attempt to bridge is the *sine qua non* of interstate commerce. Neither the complaint nor the brief indicate that any phase of interstate commerce has been affected by the alleged boycott of the appellees. It is stated that the boycott was effectuated by the circulation of a black-list through interstate mails. Certainly no implication is intended that the circulation had any effect upon interstate mails. The ultimate effect of the boycott is alleged as the barring of appellant from professional football in the United States. If

such be true, sad though it may be, it is not tantamount to an allegation that interstate commerce has been affected. We have herein before substantiated with authorities the reply that even had appellant been employed in an industry which was unquestionably engaged in interstate commerce, a boycott effected against him would not be a restraint upon interstate commerce. And the complaint informs us that the employment from which appellant was allegedly barred was in an endeavor which is neither interstate nor commerce.

STARE DECISIS.

In part II of his brief appellant contends that the *Toolson* case affords no legal precedent for decision of a problem related to the operations of professional football. He would limit the effect of the Toolson decision to the "business of baseball". He does not attempt to consider the effect of the *Toolson* case upon the *Federal Baseball* case but from his position that the activities of football must be viewed as a problem *de novo* it must be the further contention of appellant that the holding of the *Federal Baseball* case is also limited by the Toolson decision to the "business of baseball". Certainly appellant is aware that prior to the Toolson decision the *Federal Baseball* case had not received such a restricted application. The holding of the *Federal Baseball* case has constituted the basis for the decision of numerous factual situations

wholly unrelated to the "business of baseball". The United States Supreme Court has cited the decision with approval on three occasions (*Hart v. B. F. Keith Vaudeville Exchange et al.,* 262 U.S. 271, 273 (1923), 43 S. Ct. 540, 67 L. Ed. 977; *U.S. v. South-Eastern Underwriters Assn.,* 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162; *North American Company v. Securities and Exchange Commission,* 327 U.S. 686, 694, 66 S. Ct. 785, 90 L. Ed. 945 (1946)).

As recently as 1954 it was cited in a dissenting opinion together with the *Toolson* case in relation to problems of the construction industry (*U.S. v. Employing Plasterer's Assn.,* 347 U.S. 452).

It has been cited at least five times by the Courts of Appeal in relation to matters other than the "business of baseball". *(United States v. Fur Dressers' & Fur Dryers' Assn.* 5 F. 2d 869, 873 (1926); *Hart v. B. F. Keith Vaudeville Exchange et al.,* 12 F. 2d 341, 47 A.L.R. 775 (1926); *Boynton v. Fox West Coast Theatres,* 60 F. 2d 851 (1932); *Neugen v. Associated Chautauqua Company,* 70 F. 2d 605 (1934); *Conley v. San Carlo Opera Co.,* 163 F. 2d 310, 311 (1947).) The District Courts have cited the decision at least five times on matters unrelated to baseball. (*Federal Trade Commission v. Smith,* 1 Fed. Supp. 247, 250 (1932); *In re American State Public Service Co.,* 12 Fed. Supp. 667 (1935); *S.E.C. v. Electric Bond & Share Co.,* 18 Fed. Supp. 131, 146 (1937); *San Carlo Opera Co. v. Conley,* 72 Fed. Supp. 825 (1946); *McComb v. Turpin,* 81 Fed. Supp. 86 (1948); *Young v. Kellex Corp.,* 82 Fed. Supp. 953, 961 (1948).)

To undo a construction of a decision which has become so crystallized should require some very direct and positive statements to such effect. They are not found in the *Toolson* case.

Subsequent to the filing of the brief of appellant herein, the United States Supreme Court has handed down its decision in *United States of America v. International Boxing Club of New York, Inc.* (The case was decided January 31, 1955 and advanced copies of printer's proof do not indicate the citation.) Whether such decision does anything toward the clarification of the *Toolson* case or of the status of professional sports is problematical. The opinion of Chief Justice Warren states that "*Toolson* neither over-ruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball.*" Justice Frankfurter believes that *Toolson* followed the *Federal Baseball* decision.

It is obvious from the record on appeal that the complaint herein was born of a hope encouraged by language in one of the opinions in the *Gardella* case (172 F. 2d 402) that the *Federal Baseball* case was an "impotent zombi" and would be over-ruled by the Supreme Court with the first set of facts which justified its attack. The willingness of appellant to abide by the decision of the *Toolson* case rather than to press his matter for trial below testifies as to the promptings for the filing of this action. However despite the agreement to be governed by the decision of the *Toolson* appeal appellant refuses to accept the ruling of the Supreme Court that the *Federal Base-*

ball case is still the law. He dismisses entirely the *Federal Baseball* case or limits its effect by some unexpressed refinement. He would restrict our considerations to the *Toolson* decision and would confine the holding of such case to only such facts as could be classified as the "business of baseball".

We cannot permit the doctrine of *stare decisis* to become so proscribed. We are not treating with the principles of *res adjudicata. Stare decisis* comprehends a broader aspect. In its accepted meaning it assures us that a legal principle developed and declared will apply to all situations within its scope, and will not be limited to the particular situation suggesting it. We must further recognize that we are considering the doctrine as applied to decisions of the United States Supreme Court. It is so obvious as not to require statement that the highest Court in the land is not to have the opportunity of passing upon every conceivable factual situation — that decisions which it renders are to be regarded as statements of principles of law which are to be applied to situations other than the precise one in which the pronouncement was made.

The Justices of the Supreme Court on various occasions and in varying contexts, have indicated their awareness that the decision in a particular case would be applicable to other situations, e.g.:

> "As these tax decisions may have an influence on subsequent decisions beyond the limited area of the issues decided, I have thought it advisable to state my position for whatever light it may

throw * * *'' (Mr. Justice Reed in, *Comm'r v. Estate of Church,* 335 U. S. 632, 651 (1949).)

"* * * But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge." (Mr. Justice Jackson, in *First National Bank v. United Air Lines,* 342 U.S. 396, 398 (1952).)

"We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the particular case but of the system which the particular case reflects. * * * " (Mr. Justice Douglas in, *United States v. Carignan,* 342 U.S. 36, 47 (1951).)

The opinion of Justice Frankfurter in the *International Boxing Club* case presents the precise position for which appellees here contend:

"Since, in the light of all the circumstances, *Federal Baseball* was left undisturbed by *Toolson,* I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the *Federal Baseball* case should be covered by it. I cannot translate even the narrowest conception of stare decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it."

The opinions of Justices Frankfurter and Minton in the *Boxing* case consider all sports as being in the same category. We feel that such conclusion overstates the position and that greater familiarity with

sports will disclose basic differences in the organization and operation of some, and that particular reason exists to distinguish between boxing, an individual endeavor and baseball, a team sport which requires a control over the distribution of players so as to maintain a balance of power among the teams and thus insure competition. But we challenge anyone to indicate how baseball and football differ by "one legal jot or tittle". We direct the attention of the Court to the almost identical complaints found in the *Toolson, Kowalski, Corbett* cases and in the transcript here before us.

As Justice Frankfurter points out the baseball cases considered the "constituents of baseball in relation to the Sherman Act". The cases must be regarded as a determination of the applicability of antitrust statutes to a system known as organized baseball.

Certainly no one could contend that the nature of the game itself or the rules of Abner Doubleday were the occasions of the complaints which brought the Sherman Act to bear upon the "national pastime". The basis for the scrutiny of baseball in the light of antitrust legislation is found in the pattern established by the organization of the sport into leagues of member teams and the control of player talent. The gravamen of all charges directed against baseball is the uniform players' contract embodying a "reserve clause" which binds a player to the club which first obtains his services. The pattern of baseball which constituted the basis for the various challenges of the sport as of monopolistic character is expressed in

paragraphs VIII, X and XI of the *Toolson* complaint:

"VIII.

That the Defendants are engaged in the business of producing professional baseball games for exhibition; that the business of professional baseball in the United States is conducted by the various professional teams playing games against each other for exhibition to the general public. That the teams are composed of highly skilled players under contract for their services to the Club owning and operating that team. To facilitate this business the professional teams or clubs are organized into leagues. These leagues are organized from Clubs in certain geographic areas and from Clubs whose players are that of the same general abilities. Each Club then plays games for exhibition with each of the other Clubs in its league during the baseball season, which is normally from the middle of the month of April to the end of the month of September each year.

The Defendants, American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs are designated the Major Leagues. These Leagues are composed of eight teams each of whose players are the most highly skilled in the game. The Defendant, The New York Yankees, Inc., a corporation, is a member of the Defendant, American League of Professional Baseball Clubs, an unincorporated association. All of the other leagues in professional baseball are designed as Minor Leagues and their teams are designated as Minor League teams. That all of the Minor League teams are members of the various so-called Minor Leagues; that each

Minor League is a member of the Defendant, National Association of Professional Baseball Leagues, an unincorporated association. That all of the professional baseball in the United States is a part of the above outlined organization. That the Defendant, Pacific Coast League of Professional Baseball Clubs is a member of Defendant, National Association of Professional Baseball Leagues, that the Defendant Hollywood Baseball Association, a corporation, the Los Angeles Baseball Club, a corporation, and the Binghamton Exhibition Company, Inc., a corporation, are members of Minor Leagues, which leagues are members of Defendant, National Association of Professional Baseball Leagues."

"X.

That all of the baseball clubs in organized professional baseball are members of the Defendant National League of Professional Baseball Clubs, the Defendant American League of Professional Baseball Clubs or of a league which is a member of the Defendant National Association of Professional Baseball Leagues."

"XI.

That the Defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:

1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.

2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the player's contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.

3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ablility.

5. That there shall be no negotiations between a player and any other club from the one which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

7. That an ineligible player whose name is omitted from a reserve list shall not thereby be rendered eligible for service unless and until he has applied for and been granted reinstatement.

8. That any player who violates his contract or reservation, or who participates in a game with or against a Club containing or controlled by ineligible players or a player under indictment for conduct detrimental to the good repute of professional baseball, shall be considered an ineligible player and placed on the ineligible list.

9. That an ineligible player must be reinstated before he may be released from his contract.

10. That clubs shall not tender contracts to ineligible players until they are reinstated.

11. That no club may release unconditionally an ineligible player unless such player is first reinstated from the ineligible list to the active list."

Professional football is organized upon the identical pattern as that which governs professional baseball. As the Radovich complaint alleges the various teams are grouped into leagues for the purpose of competition. The control of player talent is an integral part of the system. Such control is effected through the use of a uniform players' contract which embodies a "reserve clause" determining the team affiliation of the player. These are the aggrieving constituents of the system of football just as they are the aggrieving constituents of the system of baseball. The veritable identity of the manner of operations of the two sports

is recognizable from the allegations of plaintiff in the complaint here before us. Comparison is invited of the foregoing excerpts from the *Toolson* complaint and the following paragraphs of the Radovich complaint.

> "12. Beginning in or about the year 1938 and continuing without interruption thereafter up to and including the date of filing of this complaint, the defendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize, and by unlawfully contracting, combining and conspiring to restrain trade and commerce among the several states in the business of professional football and by conspiring to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States.
>
> 13. The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:
>
> a. That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the NATIONAL LEAGUE:

b. That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

c. That defendants agree that any player violating the reserve clause will be blacklisted by all clubs in the NATIONAL LEAGUE so that no club in the said NATIONAL LEAGUE may hire him."

It is inconceivable that a decision upon the basis of the facts set forth in the *Toolson* complaint would be inapplicable to the facts found in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

It is to be anticipated that the reply brief of appellant will endeavor to make applicable to the football pattern the decision of the Supreme Court in the *Boxing* case. We believe the two situations to be clearly distinguishable. As we have heretofore indicated the factors which demand restraints and controls in the baseball and football sports do not obtain in the field of boxing. Baseball and football are team sports and in order that exhibitions of such sports present interest to spectators team competition must be keen. Unbalanced teams during the early days of baseball destroyed public interest and reduced at-

tendance. Out of such experience grew the pattern ultimately adopted by both baseball and football. It was designed to affiliate players with a team upon a more or less permanent basis so that coordinated units could be developed and so that the wealthier owners would not be able to corner the most talented players by offering higher salaries. The integrity of the sport was likewise a consideration, permanence of employment with one team assuring the public that a player was interested only in the success of his team and not that of a rival team for whom he was to be employed in the next playing season.

None of the reasoning prompting the mechanics of baseball and football operations would be applicable to the presentation of boxing exhibitions. There is absolutely no requirement or justification for all contenders for the heavyweight title to be under contract to one organization. On the contrary such arrangement could only be a cause for distrust.

The complaint in the boxing case presents an entirely different set of facts than that with which we are confronted. The boxing combination did not attempt to stabilize a sport but to eliminate the leading competing promoter, to acquire exclusive right to promote professional boxing contests in all the principal arenas where championship matches could be successfully presented and to obtain the agreement of each title contender to take part only in title contests promoted by the defendants. The complaint further alleges that the revenue derived from broadcasting, telecasting and motion picture displays of

boxing exhibitions is not only substantial but in some instances exceeds the gate receipts. Proceeds from such media are alleged to be in excess of 25% of total revenue.

The Radovich complaint makes no such allegations. The allegation of "lucrative contracts" for the interstate communication by radio and television of the playing of the games is meaningless. The record in *United States v. National Football League* (116 F.S. 319), cited by appellant, discloses that the revenue from the sale of both radio and television rights by the member teams of the League for the five year period 1947-1951 amounted to only 4.05% of total revenue.

If as the major opinion seems to indicate, the Boxing decision is predicated upon the prominence which radio, television and motion pictures play in the staging of bouts then the minor part which they play in the football scene should be a distinguishing note. However serving such statistics may be we are constrained to the opinion that they are not the real criterion. As the logic of Justice Minton makes clear these are still incidents to the exhibition and to make them the controlling factor is to give to the incidents more importance than the exhibition. Justice Minton reminds us:

> "We are not dealing here with the question of whether the respondents have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a

wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The respondents have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and sponsors into the case."

A further basis for distinction between the *Boxing* case and the instant one is found in the fact that the plaintiff-appellants are respectively, the United States Government and a private individual. The fact that the government is a party to litigation would eliminate one of the bases for scrutiny to which a complaint by a private person would be subject. It would be assumed that public interest is involved. It becomes unnecessary to determine whether the plaintiff is one "seeking the windfall of treble damages because of incidental harm". (*Conference of Studio Unions v. Loew's, Inc.,* 193 F. (2d) 51.) Such inquiry is material to the Radovich case and the answer thereto is obvious. The law tells us that recovery is to be withheld from those who seek such windfall.

CONCLUSION.

Throughout this brief appellees have advanced several distinct legal positions each of which is a justification for the order made below. It would of course be more simple to state that the matter is disposed

of by the ruling made with respect to organized baseball. We sincerely believe the baseball cases to be controlling. But we further urge that the complaint is also defective in the various other aspects specified. We again emphasize that whatever the nature of the activities of appellees, and however the exhibitions of football may impinge upon interstate commerce, nothing complained of was designed to, or did have any effect upon any instrumentality of interstate trade or commerce. We maintain that nothing complained of had any effect upon competition or upon public interests, substantial or otherwise. We contend that no conduct of appellees in the realm of the interstate incidents of the sport caused any of the damage alleged to have been sustained by appellant.

For each of these reasons we respectfully submit that the order of dismissal be affirmed.

Dated, San Francisco, California,
February 23, 1955.

Respectfully submitted,
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